Diverting Military Construction Funds During a National Emergency: Legal Framework

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On January 20, 2025, President Trump declared a national emergency pursuant to the National Emergency Act (NEA) with respect to the U.S. southern border and declared a national energy emergency under the same authority. In both cases, the President invoked the national emergency standby authority for shifting military construction funding, 10 U.S.C. § 2808 (Section 2808), to address these situations. Section 2808 permits the diversion of military construction funds appropriated for specific projects, up to a capped amount, "in the event of a declaration of war or the declaration by the President of a national emergency in accordance with the [NEA] that requires use of the armed forces." This provision allows the Secretary of Defense to "undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces." Under the statute, such projects may be initiated but "only within the total amount of funds that have been appropriated for military construction."

This Sidebar provides a brief overview of the NEA, lists the parameters of Section 2808, describes the two current national emergencies that invoke this military construction authority, and analyzes the legal precedent concerning the use of such authority. The Sidebar concludes with considerations for Congress.

The National Emergencies Act

Congress enacted the NEA in 1976 to pare back the President's emergency authorities and end the perceived continuous state of emergency, which had previously unlocked more than 470 emergency authorities. Specifically, the NEA established a framework for presidential declarations of national emergencies intended to provide enhanced congressional oversight and prevent emergency declarations from continuing in perpetuity. To accomplish these goals, the NEA terminated all then-existing presidentially declared emergencies and established procedures for future declarations of national emergencies, requiring the following:

- The President specifies which statutory emergency authorities he intends to invoke upon a declaration of a national emergency or by subsequent executive order;
- The proclamation of a national emergency and any subsequent modifications must be published in the *Federal Register* and transmitted to Congress;
- The President is responsible for maintaining records, and significant orders, rules, and regulations shall be transmitted to Congress; and
- The President shall provide an accounting of expenditures directly attributable to the exercise of such authorities for every six-month period following the declaration.

The NEA further provides that national emergencies terminate (1) automatically after one year unless the President publishes a notice of renewal in the *Federal Register*, (2) upon a presidential declaration ending a national emergency, or (3) if Congress enacts a joint resolution terminating the emergency (which would likely require the votes of two-thirds majorities in each house of Congress to override a presidential veto). While the NEA directs each house of Congress to meet every six months to consider whether to terminate a national emergency by joint resolution, it appears that Congress has not routinely met to consider such a vote on a six-month basis.

If a national emergency is terminated under any of the three processes above, the statute provides that the exercise of any powers or authorities "by reason of the emergency" shall cease, except for:

(A) any action taken or proceeding pend no finally concluded or determined on such date;

(B) any action or proceeding based on any act committed prior to such date; or

(C) any rights or duties that matured or penalties that were incurred prior to such date.

Pursuant to legislative history, this savings provision is meant to cover only legal actions or administrative proceedings based upon an action taken while the declaration of a national emergency was in effect.

Although Congress intended for the NEA to end perpetual states of emergency, it authorizes the President to renew an emergency declaration annually upon publication in the *Federal Register* and notification to Congress. As of this writing, there are more than fifty national emergencies declared pursuant to the NEA in effect, with certain emergencies annually renewed by various Administrations, some for decades. The declaration of a national emergency under the NEA may enable the President to invoke a wide array of statutory emergency authorities—CRS has identified about 115 statutes providing the President with emergency authorities that may be invoked upon declaring a national emergency pursuant to the NEA. The NEA does not define "national emergency," and courts have traditionally deferred to the President to determine whether an emergency exists.

Section 2808's Emergency Military Construction Authority

Upon declaring a national emergency pursuant to the NEA, the President may invoke the emergency military construction authority set forth in Section 2808. Originally enacted in 1982 (but based on a 1981 provision), Section 2808 provides that upon a declaration of war or the President's declaration of a national emergency "that requires use of the armed forces," the Secretary of Defense may "without regard to any other provision of law ... undertake military construction projects ... not otherwise authorized by law that are necessary to support such use of the armed forces."

Section 2808 limits the unobligated funds available for emergency military construction for that emergency to "the total amount of funds that have been appropriated for military construction" to $500 million, unless all construction takes place in the United States, in which case such funding is capped at $100 million. (The caps were enacted in 2021.) With certain limited exceptions, Presidents have generally invoked Section 2808 in connection with construction at military bases in foreign countries.

2025 Southern Border Emergency Proclamation

On January 20, 2025, President Trump signed Proclamation 10886, which declared a national emergency at the southern border that "requires use of the Armed Forces." In the Proclamation, the President invoked 10 U.S.C. § 12302 to authorize a mobilization of reserve forces and 10 U.S.C. § 2808 for the diversion of military construction funds.

The proclamation directs the mobilization of such numbers of the Reserve Components as necessary "to support the activities of the Secretary of Homeland Security in obtaining complete operational control of the southern border of the United States." The proclamation also states that it makes military construction authority available to the Secretary of Defense—and, at his discretion, to the secretaries of the military departments—in accordance with the terms of Section 2808. The proclamation does not specify which military construction projects are to be approved (or which previously approved projects may be cancelled or deferred), but the proclamation directs the Secretary of Defense to assist the Department of Homeland Security with civilian-controlled law enforcement operations by providing appropriate detention space and logistical support and to construct additional physical barriers along the border.

The proclamation revokes President Biden's 2021 proclamation that had terminated the emergency at the southern border President Trump declared during his first term in 2019. In the prior 2019 proclamation, the Trump Administration told Congress that it would defer 127 previously authorized military construction projects to make available $3.6 billion for 11 border barrier projects at various sites. President Biden's 2021 proclamation paused expenditures related to construction of the wall along the U.S. southern border and redirected those funds, to the extent possible, to different projects. It is unclear what effect revocation of the 2021 proclamation might have, in particular with respect to any ongoing military construction projects that resulted from redirected funds.

The January 20, 2025, proclamation also directs the Secretaries of Homeland Security and Defense to submit to the President within 90 days a joint report recommending, among other things, whether the President should invoke the Insurrection Act of 1807 "to obtain complete operational control of the southern border." Invocation of the Insurrection Act could potentially necessitate construction activity in support of the military, depending on whether the President considers that "unlawful obstructions, combinations, or assemblages or rebellion against the authority of the United States" has occurred and what operations are deemed appropriate to enforce the laws of the United States or to suppress a rebellion.

On April 11, 2025, President Trump released National Security Presidential Memorandum (NSPM-4), which, among other things, invokes the Engle Act's national emergency provision waiving certain requirements regarding the use of public lands for national defense purposes. The action waives the prohibition on "withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility" without Congress's approval. Under NSPM-4, federal agencies will cede control over certain land to the Department of Defense (DOD), including a 60-foot wide strip of land stretching along the border from New Mexico to California known as the Roosevelt Reservation, to form a "national defense area" there. According to DOD, military jurisdiction over the area—deemed an extension of Fort Huachuca—will permit soldiers to "establish and enforce a controlled perimeter and access" for the purpose of apprehending and temporarily detaining migrants and traffickers who attempt to cross it prior to transferring them to the custody of the appropriate law enforcement agency.

Other recent executive branch documents regarding the Armed Forces' role in immigration could potentially lead to military construction requirements. For example, President Trump issued a memorandum on January 29, 2025, directing the Secretaries of Defense and Homeland Security to expand the capacity of the Migrant Operations Center at Naval Station Guantanamo Bay "to provide additional detention space for high-priority criminal aliens unlawfully present in the United States, and to address attendant immigration enforcement needs identified by DOD and the Department of Homeland Security." It was reported that President Trump intended to order the Departments of Defense and Homeland Security to prepare the detention facility to house as many as 30,000 criminal aliens, although the Administration is apparently considering abandoning the approach. A lawsuit has been filed challenging, among other things, the Administration's statutory authority to transfer aliens to Cuba.

On January 20, 2025, President Trump signed Executive Order 14167, "Clarifying the Military's Role in Protecting the Territorial Integrity of the United States," which directs U.S. Northern Command to add planning requirements for completing its assigned mission "to seal the borders and maintain the sovereignty, territorial integrity, and security of the United States by repelling forms of invasion including unlawful mass migration, narcotics trafficking, human smuggling and trafficking, and other criminal activities." The resulting increase in military personnel assigned to support border operations and the campaign planning requirement to provide "steady-state southern border security" to fulfill the mission could conceivably lead to military construction requirements.

The National Energy Emergency Invoking Section 2808

On January 20, 2025, the President issued Executive Order (E.O.) 14156, "Declaring a National Energy Emergency," to address the nation's "inadequate energy supply and infrastructure" to, among other things, "sustain the basics of ... military preparedness." The E.O. proclaims a national emergency and directs executive branch agencies to identify and exercise available emergency authorities to address "insufficient energy production, transportation, refining, and generation," which "constitutes an unusual and extraordinary threat to ... [the] economy, national security, and foreign policy." The NEA would require the issuance of a separate executive order (or more) and publication in the *Federal Register* prior to their use if an agency identifies an emergency authority that has not been previously specified in the existing executive order declaring a national energy emergency.

The E.O. does not indicate that the national emergency requires use of the Armed Forces, although it does state that the "inadequate development of domestic energy resources" makes the United States "vulnerable to hostile foreign actors and poses an imminent and growing threat to the United States' prosperity and national security." The E.O. invokes Section 2808's construction authority pursuant to the NEA to direct the Secretary of the Army to "address any vulnerabilities identified" in the assessment mandated to review DOD's "ability to acquire and transport the energy, electricity, or fuels needed to protect the homeland and to conduct operations abroad." The assessment is required to include "potentially insufficient transportation and refining infrastructure across the Nation, with a focus on such vulnerabilities within the Northeast and West Coast regions of the United States." The assessment must also "identify and recommend the requisite authorities and resources to remedy" any identifiable vulnerabilities within those regions.

Litigation Challenging 2019 Southern Border Emergency Proclamation

The President's prior effort to invoke the NEA to divert military construction funds for border barrier construction was the subject of litigation. As previously mentioned, during his first Administration, President Trump declared a national emergency at the southern border under the NEA, invoking the same statutory emergency authorities cited in the January 20, 2025, proclamation.

In *Sierra Club v. Trump*, the U.S. Court of Appeals for the Ninth Circuit held in 2020 that a group of states and private organizations had standing to challenge the border wall construction and affirmed a district court's determination that the construction projects did not fall within the scope of the government's emergency construction authority because such projects were not necessary to support the use of the Armed Forces, nor were they "military construction projects." The necessity of the projects, the court found, had not been established, and the primary beneficiary of the border barriers was to be the Department of Homeland Security, not the Armed Forces. The court rejected the government's contention that the Secretary of Defense's determination with respect to "military necessity" was conclusive, especially given the law enforcement purpose the barriers would serve. The court also rejected plaintiffs' challenge denying the existence of a national emergency requiring the use of the Armed Forces, holding that the requirement is satisfied by the President's determination and declaration.

The court further found that the projects failed to meet the definition of "military construction" because, according to the court, the administrative assignment of real estate to the jurisdiction of a military installation for accounting purposes is insufficient to establish that it is part of the installation functionally or geographically. A different interpretation, the court wrote, would expand the President's emergency authority by permitting construction projects of any kind in any place by assigning the land administratively to a military installation. Similarly, the court rejected the contention that border barriers were included as "other activity" because such an interpretation would stretch the limitations of what constitutes military construction to encompass virtually any kind of construction. The court interpreted "other activity" to mean a form of military activity similar to the "bases, camps, posts, stations, yards, or centers" listed in the statute. To read the emergency authority as broadly as the government suggested (i.e., as referring to "any" military activity) would, the court observed, test the constitutional separation of powers with respect to Congress's appropriation powers, as well as the purpose of the NEA to provide limited powers available during a genuine emergency.

The Supreme Court initially agreed to review the *Sierra Club* case but later vacated the lower court's decision. The Court's remand and vacatur occurred after President Biden terminated the national emergency and ordered an immediate pause to the relevant border wall construction in 2021, and the Court instructed the lower courts to "consider what further proceedings [were] necessary and appropriate in light of the changed circumstances in this case." In 2023, the district court dismissed the case with prejudice in light of a settlement agreement reached by the parties.

Considerations for Congress

The circumstances in which Section 2808 could be used to support border security or to bolster the nation's energy infrastructure remain unclear. There are several main points that may require resolution to determine whether construction projects using diverted military construction funds pursuant to Section 2808 are permissible.

First, there may be disputes about whether the conditions described in the declarations provide a sufficient basis to invoke Section 2808. Before the Section 2808 authority may be used, the President must proclaim a national emergency "that requires use of the armed forces." The phrase "requires use of the armed forces" may be subject to various interpretations. The legislative history associated with the predecessor provision suggests that Congress envisioned that an emergency requiring the use of the Armed Forces would encompass military operations in preparation for or during hostilities.

Conversely, the phrase could be interpreted to apply to any authorized use of military personnel, including to support civil authorities, if necessary to respond to an emergency.

Second, even if an emergency "requires use of the armed forces," the construction project must be "necessary to support such use of the armed forces." Because Section 2808 does not set forth any substantive criteria to assess whether a national emergency "requires use of the armed forces" or whether a contemplated military construction project is "necessary to support such use of the armed forces," a court might decline to review such determinations on the grounds that they involve non-justiciable political questions. If a court were to review such determinations, it may evaluate (1) the factual record supporting the Administration's conclusion that the situation at the border and the potential energy disruptions qualify as national emergencies that "require[] use of the armed forces"; (2) the role that the Armed Forces have played and will play in addressing that emergency; and (3) the extent to which the construction at issue "support[s]" such activities. However, even if a court were to review these factual determinations, courts have traditionally afforded significant deference to executive claims of military necessity, which may stand as an obstacle to legal challenges to any factual findings supporting the invocation of Section 2808.

Third, if a court were to conclude that the situation at the border qualifies as a national emergency that "requires use of the armed forces" and that a construction project is "necessary to support such use of the armed forces," it may then need to assess whether the construction qualifies as a "military construction project" within the meaning of Section 2808. Title 10 defines the term "military construction project" for purposes of Section 2808 to include "military construction work" and defines "military construction," in turn, as "includ[ing] any construction, development, conversion, or extension of any kind carried out with respect to a military installation ... or any acquisition of land or construction of a defense access road." (Title 10 defines the term "military installation" to mean a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department"). The Supreme Court has explained that the use of the term "include" in a statutory definition indicates that the examples set forth in the definition are illustrative rather than exhaustive. However, under the canon of statutory construction known as *ejusdem generis*, non-exhaustive lists of terms are generally interpreted to include only those unnamed items that are of a similar character to the expressly enumerated items. Whether a court would conclude that any of the construction approved in connection with the two national emergencies qualifies as "military construction" may accordingly depend on whether such construction is sufficiently similar to the sort of construction undertaken "with respect to a military installation" to fall within the scope of Section 2808.

Currently, the Trump Administration's plans for employing the Section 2808 emergency military construction authority to address the situation at the southern border or the energy emergency remain unclear. Consequently, it is difficult to predict how much in military construction funds appropriated for other projects may be diverted. For example, if diverted funds are used to construct new detention facilities at Naval Station Guantanamo Bay, the full $500 million may become available rather than the $100 million available for military construction projects confined to the United States.

Congress may seek to clarify whether an emergency requiring "use of the armed forces" includes use of the military in a supporting role to law enforcement or to assist other agencies' shoring up energy infrastructure and whether military construction "necessary to support such use of the armed forces" includes any construction projects for the benefit of another agency. Congress may also consider attempting to end one or both national emergencies, using expedited procedure, or separately appropriating funds necessary to accomplish the Trump Administration's planned construction.

One bill, S.J. Res. 10, would have terminated the national energy emergency declared in Executive Order 14156, but the joint resolution failed to pass in the Senate on February 26, 2025. If a termination resolution is enacted, under the NEA, the national energy emergency would terminate as would the exercise of any powers or authorities "by reason of the emergency," other than pending legal or administrative actions covered by the savings provision described above. Any termination of a national emergency would not likely preclude the exercise of any authorities in an E.O. or proclamation that do not require a declaration of a national emergency.